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In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 697

GARFIELD A. BERLINSKY, PETITIONER

v.

TIGHE E. WOODS, HOUSING EXPEDITER, WALTER R. HEATH, AREA HOUSING EXPEDITER, JOSEPH DEEGAN, SHERIFF OF BALTIMORE CITY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court (R. 16) is not reported. The opinion of the Court of Appeals (R. 27) is reported at 178 F. 2d 265.

JURISDICTION

The judgment of the court below was entered on December 6, 1949. On March 3, 1950, petitioner's

time for filing a petition for a writ of certiorari was extended by order of the Chief Justice to March 20, 1950, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

QUESTIONS PRESENTED

Petitioner filed a complaint in the United States District Court for the District of Maryland against the respondents requesting that court to order the Housing Expediter, whose official residence is in Washington, D. C., to institute legal proceedings against petitioner's landlords to prevent petitioner's eviction from premises rented by him. The questions presented are:

1. Whether, in the absence of a general appearance by the Housing Expediter, service made upon him at his official residence in Washington, D. C., gave the United States District Court for the District of Maryland jurisdiction over his person.

2. Whether the Housing Expediter was such an indispensable party to the suit that his dismissal therefrom required the suit to be dismissed as to the other respondents.

3. Whether the district court had jurisdiction to proceed with the case in the absence of a showing that the amount involved exceeded the sum of $3,000.

4. Whether the complaint stated a claim upon which relief could be granted.

STATUTES INVOLVED

The pertinent provisions of the statute involved are set forth in Appendix A, *infra,* pp. 17-18.

STATEMENT

Petitioner was the tenant of premises situated at 857 North Howard Street, Baltimore, Maryland (R. 2). From 1933 petitioner had occupied the property under a written lease entitled "Contract for Renting Warehouses" pursuant to which he paid $40.00 a month for use of the building as an "Antique Shop and dwelling" (R. 2, 3, 6). The lease was on a month-to-month basis and subject to termination by either party on thirty days' written notice (R. 7). It was not registered under the Rent Regulations issued under the Federal Rent Control Acts because the landlords regarded the property to be predominantly business in character (R. 17, 28). On or about April 29, 1947, petitioner received a written notice from his landlords to vacate the premises on or before May 31, 1947 (R. 8). When petitioner failed to move, an eviction action was brought against him in the Peoples Court of Baltimore City which resulted in a judgment in his favor (R. 9, 10). Upon appeal to the Baltimore City Court this judgment was reversed (R. 4) upon the ground that the property was used predominantly for business purposes, and was therefore not subject to the Rent Control Acts (Appendix B, *infra,* pp. 19-23). Petitioner's appeal to the Court of Appeals of Maryland was

dismissed on the ground that the Court lacked jurisdiction to entertain an appeal from a judgment of the Baltimore City Court acting in the exercise of its appellate jurisdiction over a judgment of the People's Court (R. 24-29. See also *Berlinsky* v. *Eisenberg,* 59 Atl. 2d 327). On December 23, 1948, petitioner brought the instant suit in the United States District Court for the District of Maryland complaining that the landlords had not complied with the rent regulations, and that the Housing Expediter had arbitrarily and unlawfully failed to act in his behalf by refusing to have the alleged unlawful eviction enjoined (R. 2-5). As relief, petitioner prayed that the court order the Housing Expediter to carry out his duties under the federal statutes, and to prohibit the Sheriff of Baltimore City from evicting him from the property (R. 5). The Housing Expediter was served at his office in Washington, D. C. (R. 14, 15). The other defendants, Walter R. Heath, Area Rent Director of the Baltimore Defense-Rental Area, and Joseph Deegan, Sheriff of Baltimore were served in Baltimore.

Respondent Tighe E. Woods, Housing Expediter, filed a motion to dismiss on the ground that the United States District Court had no jurisdiction over his person (R. 14). Respondent Walter R. Heath filed a motion to dismiss upon the grounds that as Area Rent Attorney, he was a subordinate official subject to the orders of the Housing Ex-

pediter and could not be sued or enjoined unless the Housing Expediter was made a party to the action; that the complaint failed to state a claim upon which relief could be granted; and that the suit was against the United States of America which had not consented to be sued (R. 13).

The district court dismissed the complaint upon the ground that the matter had become *res judicata,* stating, "there is nothing which this Court may properly do at this time" and "it is unnecessary to consider the other questions raised by defendants' motions" (R. 16-19). On appeal the court below affirmed the judgment of the district court upon the grounds that there was no jurisdiction over the Housing Expediter since his official residence was in the District of Columbia; that he was an indispensable party to the action with the result that the action must also be dismissed as against the Area Rent Attorney and Sheriff of Baltimore City; and that the complaint sought "to control and direct the character of the action which the Housing Expediter should take in a field committed by the statute to his judgment and discretion," and therefore failed to state a claim upon which relief could be granted (R. 27-30).

ARGUMENT

1. The court below was manifestly right in holding that the district court had no jurisdiction over the person of the Housing Expediter, Tighe E. Woods, and that it could not proceed in the case

without him, since he was an indispensable party to the cause.

(a) The applicable statute, 28 U. S. C. 1391(b), which is a codification of Section 51(a) of the Judicial Code (28 U. S. C. 112 (1946 ed.)), now repealed,[1] plainly gives a defendant in a civil suit brought in a federal district court the privilege of being sued only in the judicial district of which he is a resident. That Section reads as follows:

> (b) A civil action wherein jurisdiction is not founded solely on diversity of citizenship may be brought only in the judicial district where all defendants reside, except as otherwise provided by law.

In the instant case, it is clear that respondent Woods has at no time since the institution of this suit been a resident of the State of Maryland. Section 206(e) of the Housing and Rent Act of 1947, as amended, *infra,* p. 18, provides that the principal office of the Housing Expediter shall be in the District of Columbia, and the affidavit filed by respondent Woods in support of his motion to dismiss states that his official residence has at all

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[1] The pertinent part of Section 51(a) of the Judicial Code before the codification of Title 28 read as follows:

> * * * no civil suit shall be brought in any district court against any person by any original process or proceeding in any other district than that whereof he is an inhabitant; but where the jurisdiction is founded only on the fact that the action is between citizens of different States, suit shall be brought only in the district of the residence of either the plaintiff or the defendant; * * *.

times since November 1, 1947, been in the District of Columbia, that his home is not in the State of Maryland, and that he is not an inhabitant of that State (R. 15).

It has long been held under Section 51(a) of the Judicial Code and its substantially similar predecessor statutes that, in the absence of a special statute to the contrary, a civil suit may not be maintained against a defendant without his consent in a federal district court except in the judicial district of which he is a resident at the time of the suit.[2] *Macon Grocery Co.* v. *Atlantic Coast Line R. R. Co.*, 215 U. S. 501; *Male* v. *Atchison, etc. Ry. Co.*, 240 U. S. 97; *Robertson* v. *Labor Board*, 268 U. S. 619; *Neirbo Co.* v. *Bethlehem Corp.*, 308 U. S. 165, 168.

Section 51(a) of the Judicial Code made no distinction between a federal officer and a private person (nor does 28 U. S. C. 1391(b) make any such distinction), and both this Court and the lower federal courts have long held and recognized that Section 51(a) afforded the same protection to federal officers as it did to private persons. *Butterworth* v. *Hill*, 114 U. S. 128; *Bradley Lumber Co.* v. *National Labor Relations Board*, 84 F. 2d 97 (C. A. 5), certiorari denied, 299 U. S. 559; *Howard*

[2] Rule 4(f) of the Federal Rules of Civil Procedure which outlines the territorial limits of effective service, provides that "All process other than a subpoena may be served anywhere within the territorial limits of the state in which the district court is held and, when a statute of the United States so provides, beyond the territorial limits of that state. * * *."

v. *United States ex rel. Alexander,* 126 F. 2d 667 (C. A. 10), certiorari denied, 316 U. S. 699, rehearing denied, 317 U. S. 705; *Jewel Productions, Inc.* v. *Morgenthau,* 100 F. 2d 390 (C. A. 2); *Federal Landlord Committee, Inc., et al.* v. *Woods, Housing Expediter,* Civil No. 50-156, S. D. N. Y. (Judges L. Hand, Leibell, and Ryan sitting), decided July 5, 1949 not yet reported.[3] It is elementary, therefore, that this suit against the Housing Expediter, who resides in the District of Columbia, could not be legally maintained in the United States District Court for the District of Maryland without his consent, and it is obvious that the court below committed no error in holding that the suit had been properly dismissed as to the Housing Expediter.

(b) The Housing Expediter was clearly an indispensable party to the suit, and the court below, therefore, committed no error in holding on that ground alone that the suit had been properly dismissed as to respondents Heath, Area Rent Director (referred to in the complaint as Area Housing Expediter), and Deegan, Sheriff of Baltimore City.[4] As the court below stated, "* * * the power to administer the Housing and Rent Control Act

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[3] Copies of the opinion have been lodged with the clerk of this Court.

[4] The sole relief sought against respondent Deegan was to restrain him from evicting petitioner (R. 5), and as the district court observed (R. 19), the landlords caused the eviction of petitioner to be completed after the complaint was filed but prior to the hearing of the case in that court which was held on March 4, 1949.

of 1947, as amended, was lodged in the Housing Expediter by Sections 204[5] and 206 * * *, and the purpose of the suit is to require him to take action in the exercise of his statutory powers" (178 F. 2d at 267). Respondent Heath, Area Rent Director, has no enforcement powers whatever, and the complaint does not allege that he may exercise such power. His powers are strictly limited to the discharge of administrative as distinguished from enforcement duties (12 F. R. 6911). Section 206(b) of the Act as originally enacted vested the right to sue for injunctive relief solely in the Housing Expediter. As amended, Section 206(b), *infra*, pp. 17-18, vests this right now in the United States, which may bring suit at the behest of the Housing Expediter.[6] The complaint requests action by Woods, the Housing Expediter, not by Heath, the Area Rent Director. Should a decree such as is sought by petitioner against respondent Woods be granted against respondent Heath, it could be made effective only if the Housing Expediter should exercise the discretion vested in him by the Housing and Rent Act and institute the suit, since the Area Rent Director has no power,

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[5] The pertinent parts of Section 204 of the Housing and Rent Act of 1947, as amended, are set forth in Appendix A, *infra*, p. 17.

[6] The Attorney General, who has general authority to institute suits on behalf of the United States, has delegated to the Housing Expediter authority to institute enforcement suits in connection with rent control matters. See 14 F. R. 6097-6098.

without revision of his delegated authority, to file a suit on behalf of the United States. Obviously, on this state of facts, the Housing Expediter is an indispensable party under the rule announced by this Court in *Gnerich* v. *Rutter,* 265 U. S. 388, followed in *Webster* v. *Fall,* 266 U. S. 507, and later recognized in *Williams* v. *Fanning,* 332 U. S. 490. In the circumstances, the action was properly dismissed as against respondents Heath and Deegan.

(c) The court below might well have held that the district court had no jurisdiction of this case for any purpose, since the complaint contains no averment that the amount involved exceeds $3,000. United States district courts have jurisdiction in cases based on federal questions or on diversity of citizenship only when the amount involved exceeds $3,000 (28 U. S. C. 1331-1332). The mere fact that the suit is brought against a public officer does not operate to confer jurisdiction upon a federal court if the requisite jurisdictional amount is not shown. *Clark* v. *Paul Gray, Inc.,* 306 U. S. 583, 590; *Koster* v. *Turchi,* 173 F. 2d 605 (C. A. 3); *Hock* v. *250 Northern Ave. Corporation,* 142 F. 2d 435 (C. A. 2). Although this contention was not advanced in the district court, it was asserted in the court below, and may, of course, be considered by this Court *sua sponte. Clark* v. *Paul Gray, Inc., supra,* at p. 588).

2. In addition to its holding that the district court lacked jurisdiction in this case, the court

below observed that the complaint failed to state a claim upon which relief could be granted. This view is undoubtedly sound.

The substance of the complaint was that the Housing Expediter had arbitrarily and unlawfully refused to classify the property as a housing accommodation subject to the Act and Rent Regulations, and had likewise refused to institute proceedings to restrain the landlords' eviction of petitioner from them. Although the complaint alleged that the action arose under the Emergency Price Control Act of 1942 [7] and under the Housing and Rent Acts of 1947 (R. 2), we find no provision in either statute conferring jurisdiction on the district courts over actions such as this (Cf. *Hock* v. *250 Northern Ave. Corporation, supra.* Moreover, the instant action was instituted on December 23, 1948, seeking injunctive relief, and the statute governing rent control at that time was the Housing and Rent Act of 1947, and not the terminated Price Control Act of 1942.

The only provision of the Act of 1947 conferring jurisdiction of a private suit brought by a tenant is Section 205 (50 U. S. C. App., Supp. II, 1895) which limits recovery to statutory damages. The present action is not of this character. Cf. *Hock* v. *250 Northern Ave. Corporation, supra,* at p. 437. Hence, if there was any jurisdiction at all in the

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[7] The Emergency Price Control Act expired by its own terms on June 30, 1947 (50 U. S. C. App. (1946 ed.) 901(b)).

district court, it was present solely as a result of general legal or equitable principles under which a federal court may compel a public officer to perform a ministerial duty, not involving the exercise of either judgment or discretion. *Gaines* v. *Thompson,* 7 Wall. 347, 350.

Authority to have unlawful conduct restrained is conferred upon the Housing Expediter by Section 206(b) of the Housing and Rent Act of 1947, as amended (Pub. Law 31, 81st Cong.), which provides as follows:

> Whenever in the judgment of the Housing Expediter any person has engaged or is about to engage in any acts or practices which constitute or will constitute a violation of any provision of this Act, or any regulation or order issued thereunder, the United States may make application to any Federal, State, or Territorial court of competent jurisdiction for an order enjoining such acts or practices, or for an order enforcing compliance with such provision, and upon a showing that such person has engaged or is about to engage in any such acts or practices a permanent or temporary injunction, restraining order, or other order shall be granted without bond.[8]

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[8] At the time when petitioner filed his action, Section 206(b) read as follows: "Whenever in the judgment of the Housing Expediter any person has engaged or is about to engage in any act or practice which constitutes or will constitute a violation of any provision of this title, he may make application to any Federal, State, or Territorial court of competent jurisdiction, for an order enjoining such act or practice, or for an order enforcing compliance with such provision, and

It is permissive language only and plainly indicates an intention on the part of Congress to vest broad discretion in the Housing Expediter to determine in what circumstances an enforcement suit may be brought by the United States under the Housing and Rent Act. The words, "Whenever *in the judgment of the Housing Expediter* any person has engaged or is about to engage in any acts or practices which constitute or will constitute a violation of any provision of this Act, * * * the United States *may* make application" (Emphasis ours) for an order enjoining such acts or practices, leave no room for the contention that the statute authorizes the courts to require the Housing Expediter to bring suit on behalf of the United States in cases where, in the Housing Expediter's judgment, that course of action is neither required by law nor expedient. In fact, practical considerations may make it inadvisable for the Government to sue for injunctive relief at the request of every dissatisfied tenant who calls upon it to do so. Were

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upon a showing by the Housing Expediter that such person has engaged or is about to engage in any such act or practice a permanent or temporary injunction, restraining order, or other order shall be granted without bond." [50 U. S. C. App., Supp. II, 1896(b).]

The only material modification of the section made by the amendment is that the suit for injunctive relief must now be brought in the name of the United States instead of the Housing Expediter. Since this is an action for injunctive relief, we assume the provisions presently in effect would govern and require a decree, if granted, to run against the United States, which has not been made a party. See *Ziffrin, Inc.* v. *United States*, 318 U. S. 73.

the Government required to take such action without the exercise of discretion on the part of the Housing Expediter, the courts would be burdened with an inordinately large amount of litigation, much of which would inevitably be lacking in merit. Furthermore, the Housing Expediter has been given the means to employ only a relatively small staff to police millions of housing accommodations subject to control. In view of the magnitude of the task, the Congress obviously recognized that the Housing Expediter must be allowed to exercise a sound discretion in determining the character of the litigation that should be instituted in the interest of both economy and proper enforcement.

In the instant case, petitioner requested the Housing Expediter to bring a suit to enjoin his eviction on the ground that the premises occupied by him were used predominantly as a dwelling rather than as a business establishment as claimed by his landlords. The conclusion of the Housing Expediter not to sue as requested by petitioner was clearly based on the exercise of sound discretion. This is plainly shown by the facts concerning the condition of the building stated in the opinion of the Baltimore City Court in the case of *Eisenberg, et al.* v. *Berlinsky* on appeal from the Peoples Court of Baltimore City (Appendix B, *infra,* pp. 19-23). And the application of the Rent Regulation to those facts in the light of the long adminis-

trative interpretation of the Regulation leaves no doubt that the Housing Expediter's refusal to sue was in keeping with the administrative practice relating to enforcement in the case of structures where business and dwelling uses were combined. See Interpretation 1(a)I of the Rent Regulation[9] (Pike & Fischer's OPA Service, Vol. 14, page 200:851; Appendix B, *infra,* pp. 23-27). Thus, the Housing Expediter did not act in the teeth of the statute or stubbornly refuse to act where the statute commands action, but he merely essayed to exercise the jurisdiction conferred upon him. *Adams* v. *Nagle,* 303 U. S. 532, 543. Accordingly, on familiar principles, the district court could not properly substitute its judgment for that of the Housing Expediter or control the manner in which his discretion should be exercised. *United States* v. *Seaman,* 17 How. 225; *I. C. C.* v. *Waste Merchants Assn.,* 260 U. S. 32; *I. C. C.* v. *United States,* 289 U. S. 385; *Riverside Oil Co.* v. *Hitchcock,* 190 U. S. 316; *Louisiana* v. *McAdoo,* 234 U. S. 627; *Wilbur* v. *United States,* 281 U. S. 206; *Adams* v. *Nagle, supra.*

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[9] This interpretation was issued in 1942, almost contemporaneously with enactment of the earliest rent control statute, and it has since been recognized that where a structure has combined business and dwelling uses, which are not separable, the property is not subject to the rent regulation if a predominant part of the space is used for business rather than dwelling purposes.

CONCLUSION

The decision of the court below is clearly correct, and further review is not warranted. The petition for a writ of certiorari should therefore be denied.

Respectfully submitted,

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ED DUPREE,
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APRIL 1950.

APPENDIX A

The pertinent provisions of the Housing and Rent Act of 1947, 61 Stat. 193 by the Act of February 27, 1948, 62 Stat. 37, the Act of March 30, 1948, 62 Stat. 93, and by Pub. Law 31, 81st Cong. 1st Sess. 50 U. S. C. App., Supp. II, 1891 *et seq.*), read as follows:

Sec. 204. (a) The Housing Expediter shall administer the powers, functions, and duties under this title; and for the purpose of exercising such powers, functions, and duties, and the powers, functions, and duties granted to or imposed upon the Housing Expediter by title I of this Act, * * *. [50 U.S.C. App., Supp. II, 1894(a).]

* * * *

(d) The Housing Expediter is authorized to issue such regulations and orders, consistent with the provisions of this title, as he may deem necessary to carry out the provisions of this section and section 202(c). [50 U.S.C. App., Supp. II, 1894(d).]

Sec. 206. (a) It shall be unlawful for any person to demand, accept, or receive any rent for the use or occupancy of any controlled housing accommodations in excess of the maximum rent prescribed under section 204, or otherwise to do or omit to do any act, in violation of this Act, or of any regulation or order or requirement under this Act, or to offer, solicit, attempt, or agree to do any of the foregoing.

(b) Whenever in the judgment of the Housing Expediter any person has engaged or is about to engage in any acts or practices which constitute or will constitute a violation of any provision of

this Act, or any regulation or order issued thereunder, the United States may make application to any Federal, State, or Territorial court of competent jurisdiction for an order enjoining such acts or practices, or for an order enforcing compliance with such provision, and upon a showing that such person has engaged or is about to engage in any such acts or practices a permanent or temporary injunction, restraining order, or other order shall be granted without bond.

* * * *

(e) The principal office of the Housing Expediter shall be in the District of Columbia, but he or any duly authorized representative may exercise any or all of his powers in any place and attorneys appointed by the Housing Expediter may, under such authority as may be granted by the Attorney General, appear for and represent the United States in any case arising under this Act.

APPENDIX B

IN THE BALTIMORE CITY COURT

Case No. 6465-47

HELEN EISENBERG AND SAFE DEPOSIT AND TRUST CO., TRUSTEES, PLAINTIFF

vs.

GARFIELD A. BERLINSKY, 857 N. HOWARD STREET, DEFENDANT

ORAL OPINION OF THE COURT

(Judge E. Paul Mason)

MEMORANDUM OPINION

Mason, J. (orally):

Gentlemen, this is a rather interesting case. It is not the first case we have had along this same line. Of course, the OPA Act works both ways. It is not a single-track railroad. It runs both ways, and sometimes it helps the landlord, and sometimes it helps the tenant. I should say, more often it helps the tenant.

In this Court it has been uniformly held that we are bound by the provisions of the OPA Act; and I remember not long ago we had the question whether two apartments, which a tenant had rented, were rented as a single unit or as two separate apartments. The landlord wanted to charge as if they were two apartments. I rather thought there were two because he collected two rents for them, but the OPA decided it was a single unit and, accepting their ruling on it, I found that it was a single unit,

and that the landlord could not collect any more than what the apartments rented for as a single housing unit. As I say, the Court has followed the Act all the way through, and it must, of necessity, follow it in this case as well.

I find nothing in this case to indicate that the property 857 North Howard Street is subject to the regulations of the OPA, a unit or agency of the Federal Government. It is not registered; it has not been the subject of any housing determination as to the amount of rent. Apparently, there has been no effort by either the landlord or the tenant to regard it as anything else but a business property. Neither party has, apparently, endeavored to have it classed as a dwelling unit, or to have any part classed as a dwelling unit and, if they have, I must assume unsuccessfully because I cannot believe that it was ever registered, not having the evidence before me; and I have the evidence of the plaintiff in the case that it was never registered because they regard it as business property. When you get around to that, what I may call a conclusive presumption on the part of the Court, in addition to that, if I had to determine it without the aid of that presumption, I would still find that it is a business property; and I would determine that by using the OPA regulations, which provide that if a building is predominantly used for business purposes it should be classed as business property. If, on the other hand, the predominant use is for dwelling purposes, it should be considered a dwelling unit; and, if it is severable, that part which is used for business is business, and that part which is used for dwelling is dwelling property.

This property may be severable in the sense it could if it were used in certain ways, partly as a dwelling and partly as a place of business, but the Court finds it has not been so severed. It has been used mainly as a business proposition all the way through. The testimony of Mr. Foster, produced on behalf of plaintiffs, which is not substantially denied, is that the first floor is used for the storage or display of antiques. There are some things in the kitchen which may indicate it is used as such, but there is no gas for cooking. I understand there is an electric stove in there. There is no heating arrangement except the oil stove in the store, and there has been no coal used in the coal stove for many, many days, as the defendant himself has stated, although he did burn wood left from his furniture repair work, finding the wood more accessible. I would have to reach the conclusion that the only part of that floor that was really used for dwelling purposes was that part of the room in the middle which had the couch, which was used for sleeping purposes, but which is not now so used because the defendant has put his couch upstairs.

When you get to the second floor it is found that that part of the premises is filled with antiques all the way through. The bathroom is not usable. It has not been used for a long while. That is something that would be appurtenant to a dwelling use and, frankly, the last thing that the Court can conceive of that is usuable is a worthless or waterless bathroom.

When you get to the third floor what you have up there is a book storage warehouse, primarily.

The back room has some furnishings but, as I get it, there were more books up there than anything else, and they were numerous, and no one is living on the third floor, and no one had been living there for a long while; no heat in the house except in the small stoves on the first floor; no water in the house; no gas in the house; no electricity above the first floor.

On the facts, as well as on the presumption which I have with the property not being registered, the Court would say that the only part of the building that is possibly being used for dwelling purposes would be that part which contains the couch, now on the second floor, and formerly on the first floor. So, I conclude that it was and is a business proposition.

With that in mind, there is not anything the Court can do except to say the plaintiffs must prevail, and that the judgment must be for the plaintiffs for repossession of the property.

Now, I understand there is this question: I understand that the tenant has paid no rent since spring. It would seem the damages in the case should be the amount of the rent from that time. It is perfectly true he has tendered it while, on the other hand, the landlord has not received it, and I see no reason why the landlord should be without it.

The judgment of the Court will be for plaintiffs with damages that aggregate the amount of the rent due from the tenant from the time the last rent was paid up until such reasonable time as I would stay the proceedings to allow the tenant to vacate. When is the rent payable?

Mr. BUTLER: On the first of the month.

The COURT: Have you calculated those damages?

Mr. BUTLER: $200.00, may it please your Honor, being five months at $40.00 per month.

The COURT: The judgment will be for restitution of the property, $200.00 damages, and costs, and stay of execution of ejection until the last day of this month.

OCTOBER 27, 1947

INTERPRETATION 1 (a)-I

(Pike and Fischer's OPA Service, Vol. 14, page 200:851)

STRUCTURES IN WHICH BUSINESS AND DWELLING USES ARE COMBINED

Housing accommodations are defined in Section 13 (a) (6) of the Housing Regulation as *"any building, structure, or part thereof, or land appurtenant thereto, or any other real or personal property rented or offered for rent for living or dwelling purposes, together with all privileges, services, furnishings, furniture, equipment, facilities and improvements connected with the use or occupancy of such property."* A similar, though not identical, definition is contained in Section 13 (a) (6) of the Hotel Regulation.

Structures not "rented or offered for rent for living or dwelling purposes" are not subject to the Rent Regulation. Nevertheless, buildings or structures in which business and dwelling uses are combined may, under some circumstances, be subject to the Regulation.

If within the same structure there are two portions, one of which is devoted exclusively to a business or commercial use and the other of which is devoted exclusively to a living or dwelling use, the Regulation will not apply to the business or commercial portion if it is rented to a separate tenant. This is true even though, at some earlier date, the two portions were rented to one tenant, under a single lease calling for a single rent. The necessity for determining whether the business portion is regulated arises only where, on or after effective date, the two portions are rented to the same tenant.

In determinations as to the extent of control of property used for both dwelling and business purposes, two tests are to be used: First, are the business and dwelling portions separable and, second, if they are not, what is the predominant use? If the business and dwelling portions are separable, only the dwelling portion is subject to the Regulations. If they are not separable, then either both portions are subject to the Regulation or neither is controlled. The result under such circumstances depends upon predominant use.

SEPARABILITY

If the physical characteristics of the property are such that it is feasible for the tenant to remain in occupancy of the dwelling portion while some other person is using the business portion, the two portions are separable.

The business and dwelling portions are separable in either of the following cases:

(1) Where they are in separate structures.

(2) Where they are in the same structure, but

(*a*) There are separate means of access, and

(*b*) The dwelling portion is usable as a dwelling without the need for access to the business portion, and

(*c*) The use of the business portion does not require access to the dwelling portion, and

(*d*) The dwelling portion is, or can readily be, completely shut off from the business portion.

To illustrate the second situation: It is common for a structure to contain a store on the first floor and an apartment or other dwelling unit on the second floor. The entrance to the apartment is through a stairway which runs alongside, but outside, the store, so that the tenant of the dwelling has access thereto without going through the store. The store and apartment are separable and only the apartment is regulated.

Premises which do not in some particular respect comply with the specific tests of separability just stated may nevertheless be found separable where it is very clear that, by the standards and practices of the community, it is feasible for the tenant to occupy the dwelling portion while the business portion is being used by some other person.

Where the premises are separable, so that only the dwelling portion is subject to the Regulation, it will often be necessary to make an apportionment of the rent on the date determining the maximum rent in order to establish the maximum rent for the dwelling. Thus, it may be that, on maximum rent date, the landlord rented both portions to the same tenant under a single lease calling for one rent.

The rent for the dwelling portion is to be established by apportionment, and the landlord, in the first instance, may make such apportionment. The apportionment must be fair and reasonable.

However, if the landlord chooses, he may, within 30 days after the effective date of the Regulation, file a petition under Section 5 (d) for a determination of the maximum rent, on the ground that it is in doubt, or in dispute, or unknown. The Rent Director at any time, on his own initiative, may institute proceedings under Section 5 (d) to determine the maximum rent, on the same ground. Likewise, if the landlord makes his own apportionment, the Rent Director may review it by proceeding on his own initiative under Section 5 (d). His determination in either case will be made on the basis of how much of the total rent is fairly and reasonably to be allocated to the dwelling.

PREDOMINANT USE

If the business and dwelling portions are not separable according to the tests set out above, the two portions are to be treated as a unit for purposes of determining whether the property is subject to the Regulation. The initial test of predominent use is to be made on a space basis. If a predominant part of the space is used for business purposes, the property is not subject to the Regulation. Where less than a predominant part of the space is used for business purposes (and also where the space test cannot be used because there is no physical segregation of the space used for business purposes and that used for dwelling purposes), a second test of predominant use, in terms of rental value, is to be

used. If the rental value of the business portion (or of the business use, where the two uses are not physically segregated) is clearly in excess of the rental value of the dwelling portion, the property is not subject to the Regulation; otherwise it is subject.

Thus the property as a unit is free of control by the Regulation where either (1) the predominant use, on a space basis, is for business purposes, *or* (2) the rental value of the business portion is clearly in excess of the rental value of the dwelling portion. If neither of these tests is satisfied, the property as a unit is subject to the Regulation.

It should be pointed out, however, that if housing accommodations within the structure are subleased, such accommodations are subject to regulation without regard to regulation of any other part of the structure.

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CHARLES ELMORE CROPL
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IN THE

Supreme Court of the United States

No. 697

GARFIELD A. BERLINSKY, 895 North Howard Street, Baltimore 1, Maryland,

Petitioner,

vs.

TIGHE E. WOODS, Housing Expediter, Office of Housing Expediter, Temporary Building E, Fourth Street & Adams Drive, Washington 25, D. C.,

Respondent,

WALTER R. HEATH, Area Housing Expediter, 400 East Lombard Street, Baltimore 2, Maryland,

Respondent,

JOSEPH DEEGAN, Sheriff of Baltimore City, Baltimore City Court House, Baltimore 2, Maryland,

Respondent.

PETITION FOR REHEARING ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

GARFIELD A. BERLINSKY,
895 North Howard Street,
Baltimore 1, Maryland.

The Daily Record Co., Baltimore 3, Md.

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PETITION FOR REHEARING ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

This Petitioner, Garfield A. Berlinsky, prays and respectfully petitions this Honorable Court for a rehearing on petition for writ of certiorari to issue to review the opinion and judgment of the United States Court of Appeals for

the Fourth Circuit, (R. 27-30) rendered and entered December 6th, 1949, after a hearing November 9, 1949, affirming judgment of the United States District Court for the District of Maryland (R. 16-19).

The Court having denied the writ, allowed fifteen days from May 1st within which to file petition for rehearing which time, upon order of the Honorable Chief Justice, was extended to and including May 24th, 1950.

JURISDICTION OF THIS COURT

Jurisdiction of this Court as to rehearing is invoked under the Revised Rules of the Court (No. 33 as amended pages 51, 52). Jurisdiction as to petition for writ of certiorari was invoked under 28 U. S. C. A. 1254.

ARGUMENT

The brief for the respondents in opposition to petition for writ of certiorari is an instrument evidently calculated to perpetrate a fraud upon this Honorable Court.

None of the provisions quoted therein, Appendix A pp. 17 and 18, had come into effect when the landlords (Helen Eisenberg and Safe Deposit and Trust Co. of Baltimore, Trustees) on April 29th 1947 sent this petitioner (tenant) the unlawful notice (R-8) to vacate in one month, nor had they come into effect when (June 5th, 1947) landlords unlawfully instituted suit (R-3 par. 5) without having complied with any requirements of the Rent Control Act or regulations R-4 par. 12).

Although respondents carefully conceal from this Honorable Court the effective date of every provision quoted in their brief, Appendix A, which they incorrectly aver are "The pertinent provisions of the Housing and Rent Act

of 1947, act of February 27, 1948, act of March 30, 1948, Pub. Law 31, 81st Cong. 1st Sess. 50 U. S. C. app., Suppl. II, 1891 et seq." (they give no date for the last mentioned). *The date is March 30th, 1949,*—one year and eleven months after the beginning of suit to evict this tenant and the unlawful granting of order to evict which was the basis for this action; more than three months after this petitioner instituted civil action (complaint) against the Housing Expediter in the United States District Court for the District of Maryland; and three months after the eviction took place. None of the quoted alleged "pertinent" provisions have to do with any of the acts cited.[1]

The unlawful order of eviction which was the basis of the threatened violation of the Act, was granted by the Baltimore City Court (which lacked jurisdiction) October 27, 1947 (Case No. 002298). Fourteen months later, i.e., December 1948 (R-4 par. 14) the Sheriff notified petitioner that he would evict him. It was then, after failure and refusal, of the Housing Expediter and Area Rent Director to take action to stay the threatened eviction and without a hearing that the complaint against them was filed in the United States District Court.

This petitioner through counsel Dec. 23rd, 1948 (R-5) properly evoked Sec. 206(b) under the 1948 act which then read:

> "Whenever in the judgment of the Housing Expediter any person has engaged or is about to engage in any act or practice which constitutes or will constitute a violation of any provision of this title, *HE* (petitioner's emphasis) may make application to any Federal, State or Territorial Court of competent jurisdiction for an order enjoining such act or practice * * *". (Quoted in full pp. 4 and 5 of petitioner's plea for writ of certiorari.)

[1] Pertinent provisions as submitted by petitioner are in appendix pp. 23 et seq. infra.

The respondents cite as the "pertinent provision" Sec. 206(b) of the *1949* act which had not been enacted when any of the proceedings herein referred to took place or had being, and which respondents quote as follows:

> "Whenever in the judgment of the Housing Expediter any person has engaged or is about to engage in any acts or practices which constitute or will constitute a violation of any provision of this Act, or any regulation or order issued thereunder, the *United States* (petitioner's emphasis) may make application to any Federal, State, or Territorial Court of competent jurisdiction for an order enjoining such acts or practices * * *."

In this manner respondents fraudulently represent to this Court that the responsibility, (right or duty) which petitioner claims was the Housing Expediter's at the time, Sec. 206(b) was invoked in the United States District Court (December 23rd 1948 and at the hearing March 4, 1949) was not his but that of the United States. Yet that change in Sec. 206(b) did not come into effect until March 30th, 1949; it certainly was not a "pertinent provision" of the housing and rent acts cited by respondents in the first paragraph of the Appendix, p. 17 of their brief in opposition to petition for writ of certiorari.

Having thus planned to establish in the minds of this Honorable Court the acceptance of the provisions presented, in Appendix A pp. 17 and 18, as "pertinent" to the issues, respondents on page 12 of their brief instead of quoting Sec. 206(b) of the Housing and Rent Act of 1947 as amended by Act of 1948 which was in effect when appeal for administrative relief was made to the Housing Expediter and the Area Rent Director (R-4 par. 12 and 13) and which authorizes the *Housing Expediter* to take specified action to have violation or threatened violation of any pro-

vision of the Rent Control Act enjoined, quote prominently in large type the then non-existent Pub. Law 31, 81st Cong. (again omitting the date) which was not to be enacted until March 30th, 1949.

In a small-type foot note (p. 12) is quoted the genuinely pertinent and applicable Sec. 206(b) i.e., that section of the 1947 Act as amended by Act of 1948. Concerning respondents' assumption (2nd par. foot note p. 13) that provisions presently in effect would govern and require a decree, if granted, to run against the United States, which has not been made a party, it could not have been known April 29th, 1947, when the landlords sent their unlawful notice to vacate and the Area Rent Director was appealed to for administration relief, nor on Dec. 23, 1948 when the instant action was instituted against the Housing authorities in the United States District Court for the District of Maryland, that the Section would be changed to substitute, "the United States" for the "Housing Expediter".

The institution of the action resulting in this violation of the federal statute and petitioner's rights took place while the 1942 Statute and applicable amendments were in effect which, as amended, provided:

> "Sec. 1(b) The provisions of this Act * * * shall terminate June 30, 1947, * * * except that as to offenses committed, or rights or liabilities incurred, prior to such termination date, the provisions of this Act and such regulations, orders, price schedules, and requirements shall be treated as still remaining in force for the purpose of sustaining any proper suit, action, or prosecution with respect to any such right, liability or offense."

Respondents also give this Court erroneous information in failing to so state in foot note 7, page 11 of their brief

in opposition. In Fleming v. Mohawk, Co. 331, U. S. 111, this Honorable Court said

> "and Congress has explicitly provided that accrued rights and liabilities under the Emergency Price Control Act are preserved whether or not suit is started prior to the termination date of the Act."

The respondents, under Appendix A, second paragraph, quote 204(a):

> "The Housing Expediter shall minister the powers, functions, and duties under this title; and for the purpose of exercising such powers, functions, and duties granted to or imposed upon the Housing Expediter by title I, of this Act, * * * (50 U. S. C. App., Supp. II, 1894(a).)"

(No date is here shown by respondents.)

Supplying the remainder of the section quoted in part, petitioner adds from the *1949* act "the Office of Housing Expediter is hereby extended until the close of June 30, 1950." Since asterisks replaced only these few words it is obvious respondents intended, thru such substitution to conceal from this Court the dates 1949 and 1950 which would show the complete irrelevancy of the partially quoted provision. Sec. 204(d) as quoted (also without revealing date) in Appendix A, p. 17 of respondents brief has to do with 1949 law, having no bearing whatever on the issues here involved.

Likewise Sec. 206(a) as quoted in Appendix A, p. 17, of respondents' brief was a 1949 (Public Law 31, 81st Cong.) amendment which, in the quoted form does not apply to the issues here submitted.

Again concealing the 1949 date from the Court, the respondents quote (last paragraph p. 18 of their Appendix) Sec. 206(e) as follows:

"(e) The principle office of the Housing Expediter shall be in the District of Columbia, but he or any duly authorized representative may exercise any or all of his powers in any place and attorneys appointed by the Housing Expediter may, *under such authority as may be granted by the Attorney General*, appear for and represent the *United States* in any case arising under this act." (Italics supplied.)

The Court is respectfully informed that this sub-section (e) was not in effect on the date this petitioner filed action in the United States District Court against respondents, i.e., December 23rd, 1948. Although here, too, respondents concealed the effective date, (March 30, 1949), they represent to this Honorable Court that it was in effect when the action was filed, accomplishing this deception by saying in footnote on page 9,

"[5] The pertinent parts of Section 204 of the Housing and Rent Act of 1947, as amended are set forth in appendix A infra p. 17" (their brief).

but failing to say that since this did not become effective until March 30, 1949, it was not applicable.

The deception is carried further in argument, page 9 concerning 206(b) and referring to the (false) claims pp. 17 and 18 of respondents's brief (Appendix) again without informing the Court that the effective date precludes its application to the instant case.

The plain truth is, as respondents must have known, that at the time this petitioner filed the action (Dec. 23, 1948) and at the date of the hearing (March 4, 1949), Sec. 206(b) did not vest this "right" in the United States but, as shown in correct quotation pages 4 and 5 of petition for writ of certiorari, the "duty" (if the statute was to be enforced as Congress intended) distinctly devolved upon the Housing Expediter.

It is not true as respondents attempt to convey in argument, pages 9 and 10 that the proper remedy can not be provided in the instant case. The Housing Expediter is empowered to delegate authority (please see top of page 12, petition for writ of certiorari). If he were not delegating power (in this Honorable Court's own language in Fleming v. Mohawk Co. 331 U. S. 111)

> "* * * Delay might do injury beyond repair. The pyramiding in Washington of all decisions of law enforcement would be apt to result in paralysis * * *."

Sec. 201(b) of the original (1942) act H. R. 5990 Public Law 421, 77th Cong. 2nd Sess. 56 Stat. p. 23, Chap. 26, was still in effect when landlords' unlawful notice to vacate was sent this petitioner, at which time the local Area Rent Director was notified and appealed to, to stop the unlawful procedure (R-4 par. 12); that section reads:

> "The principal office of the administrator shall be in the District of Columbia, *but he or any duly authorized representative may exercise any or all of his powers in any place.*" (Italics supplied.)

In the very first paragraph of Sec. 201(a) of the 1942 Statute creating the Office of Price Administration, now called Housing Expediter, the Congress provided that

> "The Administrator may, subject to the civil-service laws, appoint such employees as he deems necessary in order to carry out his functions and duties under this act * * *." (Please see Fleming v. Mohawk Co., 331 U. S. 120.)

On page 9, (8th line from top), respondents' brief says:

> "His (Area Rent Director Heath's) powers are strictly limited to the discharge of administrative as distinguished from enforcement duties"

and 12 F. R. 6911 is cited. F. R. Document 47-9461, Filed Oct. 22, 1947, 12 F. R. 6911, Section 851.70 reads:

"Nothing contained in the delegations of authority published in this sub-part (851 sub-part B, Field Offices) shall be deemed to revoke or otherwise limit delegations of authority by the Housing Expeditor which have been previously published except to the extent that they are inconsistent with the above delegations. Delegation of authority previously published by the Housing Expeditor under the Emergency Price Control Act of 1942, as amended remain in full force and effect for the purpose of sustaining any proper suit, action or prosecution under that act * * *." F. R. Doc. 47-8274, filed Sept. 4, 1947 12 F. R. page 5917.

Par. 840.7,

"Action by the rent director *On His Own Initiative*, (Italics supplied). He shall, before taking such action, serve a notice upon the landlord of the housing accomodations involved stating the proposed action and the grounds therefor. The proceeding shall be deemed commenced on the date of issuance of such notice."

Same document par. 840.59 Saving provisions (b)

"In so far as offenses committed, or rights or liabilities incurred on or prior to June 30, 1947, are concerned, Revised Procedural Regulations, Regulation 3, as amended, promulgated by the Office of Temporary Controls, office of Price Administration, shall be treated as still remaining in force for the purpose of sustaining any proper suit, action, or prosecution with respect to any such right, liability, or offense arising under the Emergency Price Control Act of 1942, as amended."

DECISION OF THE COURT BELOW

It is plain deception for the respondents to portray to this Court "that the Court below had committed no error in holding that the suit had been properly dismissed as to the Housing Expediter" and to make it appear that such dismissal was on the ground they indicate. The suit was not

dismissed on that ground nor on the ground that the Housing Expediter was an indispensable party. The decision of the Court below erroneously so stated but the indisputable fact is that the said District Court's decision (R. 19) did not even consider the motion of the Housing Expediter for dismissal nor the motion of defendant Heath. The part of said decision dealing with their motions is correctly quoted at bottom of p. 10 of petition for writ of certiorari. *The motions were not even considered.*

CONCERNING HEARING BEFORE THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioner now respectfully states that having learned from a reading of the transcript of the proceedings of the hearing in the United States District Court of Appeals held March 4, 1949, that counsel engaged by him to defend his rights under the federal statute had declared in open court:

> "The Court of Appeals of Maryland held that the Baltimore City Court and People's Court had jurisdiction on that matter and explained that they were not subordinate to any Federal law in jurisdiction. *That I agreed with.* The contention of the defendant was that they did not register the property because they felt it was not necessary, where they rented it for the purpose of a dwelling." (Italics supplied.)

and had committed other acts against petitioner's interests, he submitted a petition to the Court averring in part

> "* * * Knowing that the brief submitted by counsel was not prepared or submitted in good faith in my behalf or in my best interests, and having, previous to the date of counsel's letter herein referred to (of date, October 20, 1949), criticized the brief and protested against its being submitted as prepared, I repudiate the brief as for me before this Honorable Court."

That Petitioner further informed the court that petitioner had

> "* * * filed formal, written, complaint against counsel * * * with the Grievance Committee of the Maryland Bar Association, charging that counsel has been * * * indifferent to my interests, and helpful to the interests of defendants and the landlords."

With his petition to the court petitioner submitted copy of complaint to the Bar Association and in the petition prayed

> "delay in the hearing or trial of this case until the next term of the court in order to enable me to properly prepare, or have prepared, a suitable and proper brief in my behalf and to otherwise properly prepare for the hearing or trial."

The prayer was not granted. Petitioner was ordered to argue the case instanter for himself.

DECISION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

Was it not grave error for the United States District Court to fail to decide the issue raised by the complaint? The Court decided erroneously that the matter was res judicata, reciting the various dates which make it appear that since the time for appeal from the decision of the Maryland Court of Appeals had expired, there was nothing the court could do. Whereas the issue was not on appeal from that decision. Decisions from state courts lacking jurisdiction could not alter the status of petitioner in relation to the federal statutes. Although then threatened with eviction he had not yet been evicted; he was still the lawful, incumbent tenant entitled to the protection of the laws of the United States.

It is apparent from the transcript of the proceedings of that hearing that the Court was under an erroneous im-

pression as to the legal importance of the regulations: (Quoting testimony)

> "The Court: 'There is nothing in the law which defines what is a dwelling house and what is a commercial house. It is only in the regulations.'
>
> Mr. Klupt: Counsel for complainant, (this petitioner): 'That is correct, your Honor. And the regulations themselves state that any place used for a dwelling shall be registered. It goes on further to state as to the property used, whether the two can be used, and as to the value.'
>
> Mr. Barrett (Counsel of the Area Rent Director's Office): 'The *law* does not say that.'" (Italics added.)

Would not this indicate to a Judge who had made known his unfamiliarity with the legal importance of the regulations that it was only the *law* (as distinguished from the regulations) that mattered?

Although as can be seen from the transcript of the proceedings that at least two important members of the legal staff of the housing authorities were present throughout the hearing, no one informed the Court that the regulations had the force and effect of law. By their silence the representatives of the Housing Expediter, appointed to enforce the statute, allowed the misunderstanding to go uncleared.

> "(Mr. Barrett) Your Honor * * * Mr. Tighe E. Woods, National Housing Expediter, is a defendant in this case. For that reason, litigation attorney, Miss Louise F. McCarthy, has come to argue this motion for Mr. Tighe E. Woods."
>
> * * * * * *
>
> "(Miss McCarthy) The facts are that Garfield Berlinsky was the tenant of a building which was used both as a shop and a dwelling. The Rent Control Authorities had not required that it be registered[1] be-

[1] The lease (appendix, petition for certiorari) distinctly says "antique shop and *dwelling*. Regulations, Section 7, makes it mandatory upon land-

cause, in their opinion, it was principally a commercial building[2] and, therefore, they did not feel that it came under the rent control provisions,[3] which refer only to housing accommodations."[4]

Mr. Berlinsky was served with a notice of eviction by the landlord after he had been in the premises since 1933, long before rent control went into effect.[5]. He requested the Area Rent Director and the Washington Authorities to enjoin the eviction, and they declined to take action in the matter.[6] Then he brought this suit to compel them to start proceedings to enjoin his eviction, and he joined the Sheriff, to have him restrained from evicting him under State Court proceedings, which have already been completed.[7]

---

lords to register property of any kind (or part thereof)—it does not say principal part—rented, or even offered for rent, for living or dwelling purposes.

[2] Even the interpretation 1(a) I p. 23 of respondents brief which has to do with structures *not rented or offered for rent for living or dwelling purposes* says (last paragraph page 27) "It should be pointed out, however, that if housing accommodations within the structure are subleased, such accommodations are subject to regulation without regard to regulation of any other part of the structure." The eviction was threatened and later,—because the Housing Authorities failed in their duty,—actually enforced against the building—dwelling as well as business portion.

[3] Mandatory requirement to comply with law does not hinge on belief or feeling. The law required registration. Even the housing expediter had no authority to exempt from the requirement to register. There were provisions for adjustment—but only after requirement to register had been met; then the tenant's rights had also to be considered—Landlords leased the property for dwelling as well as business purposes; they could not have thought otherwise.

[4] And, having been leased for dwelling as well as business purposes it was housing accommodation within the meaning of the law and regulations. Sec. 13 (a) 6 defines housing accommodations as "any building, structure, or part thereof, or land adjacent thereto or any other real or personal property rented or offered for rent for living or dwelling purposes * * * connected with the use or occupancy of such property."

[5] Having resided and conducted business in the premises since 1933, "long before control went into effect" was not a bar to protection under the law, nor did that circumstance confer upon the landlord exemption from the legal necessity to register the property.

[6] It had been their duty to require registration and to assume control over the property at the time of and since the enactment of the Statute. R-4, par 13 indicates the great effort petitioner put forth to have them do their duty before he filed complaint in the United States District Court.

[7] But the effort (*) covered a long period before the State Court proceedings were completed and the eviction had not taken place when the action in the United States District Court was commenced to prevent it.

"The Court) You say the Sheriff is a defendant, too?

(Miss McCarthy) That is true, your Honor. We are not appearing on his behalf. I think he is there purely for the sake, if the requested relief against the Housing Expediter is granted, so that he can be restrained until the suit—

(The Court) Has there been any appearance, Mr. Klupt?

(Mr. Klupt) No, your Honor.

(The Clerk) I believe the Attorney General's Office contacted him, and they said they did not make an appearance for the sheriff."

* * * * * *

"The Court) Now, let me see if I understand you. You mean that, although Mr. Tighe E. Woods has been bringing suits all over the country himself, people can't, in turn, sue him?

(Miss McCarthy) That is correct, your Honor. That is what I mean.

(The Court) That does not sound reasonable on its face, does it?

(Miss McCarthy) That is the general rule."

* * * * * *

"(The Court) And, in a simple word, what do you understand this suit to be,—if you will just clarify again?

(Miss McCarthy) As I understand the suit, this plaintiff is trying to compel the Housing Expediter to enjoin his landlord from evicting him, on the ground that this is a housing accommodation[8] and, therefore, Mr. Woods must take action to prevent action in every suit in which a tenant is being evicted by his landlord.[9]

---

[8] It is a housing accommodation in part and leased for that purpose (See (4)).

[9] He was appointed to carry out the purpose of the law as enacted by Congress. It was his duty to prevent unlawful action in every suit in which a tenant was being evicted from housing accommodations as defined in Sec. 13(a) 6. (See (4)).

(The Court) Is there any formal ruling by the Housing Administrator or the Area Rent Director that these particular premises are commercial?

No, your Honor. It works the other way.[10]

(The Court) You mean they do not act if they believe it is commercial, and they do not pass any formal order as to it?

(Miss McCarthy) That is correct,—unless the housing accommodations are required to register.[10] This landlord did not register his accommodations because he believed them to be commercial.[8] The Area Rent Director here agreed that they were commercial *and took no action.*[10] He is trying to force the Housing Expediter to exercise discretion in this matter."[11]

Further the transcript of proceedings of the hearing, March 4th, 1949, No. 4280 records the Court as saying to counsel:

"Then, as I understand it, you are asking this Court in effect to do this, to intervene at this late date, and after a Federal Officer has said he has no jurisdiction, and there is nothing in the law compelling them to take jurisdiction; that is there is no definition of what is a dwelling house and what is a store. Nevertheless you are asking, although he has *renounced jurisdiction to the City authorities* and the City authorities *have assumed jurisdiction* * * *."

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[10] These answers are completely erroneous and misleading. More than five years elapsed before the question arose. In the first place registration was mandatory as to the landlord and it was the duty of the housing authorities to compel it. Since the lease was for dwelling as well as business property.

[8] Mandatory requirement to comply with law does not hinge on belief or feeling. The law required registration. Even the housing expediter had no authority to exempt from the requirement to register. There were provisions for adjustment — but only after requirement to register had been met; then the tenant's rights had also to be considered — Landlords leased the property for dwelling as well as business purposes; they could not have thought otherwise.

[11] Simply to give the protection the Congress authorized.

CIRCUMVENTION OF SUPREME COURT'S DECISION AND OF REGULATION AS TO TENANT'S RIGHT TO PROTEST CERTIFICATE RELATING TO EVICTION.

In Code of Fed. Reg. U. S. A. 1947 Supp. titles 31-42 page 4771 Sec. 1300.208(c) the Housing Expediter sets out:

> "The Supreme Court of the United States has ruled in Parker v. Fleming, 67 Sup. Court (329 U. S. 531—reference supplied) that tenants of housing accommodations are entitled to administrative review of orders granting certificates relating to eviction pursuant to section 6(b) of the rent regulations."

If an *actual* order was issued or certificate given, the tenant's (this petitioner's) rights under Procedural Regulation 3 as amended 1, Sec. 1300.208(b) effective April 16, 1947 (12 F. R. 2476 were completely ignored. The section provides that

> "Where petition requests a certificate relating to eviction a copy of landlord's petition and all supporting documents shall be served by the rent director upon the tenant * * * and the tenant shall be provided an opportunity to present objections or other written evidence prior to entry of any final order on the petition. A copy of such final order shall be served by the rent director upon the tenant. * * *"

Section 1300.209(a)

> "Any tenant occupying housing accommodations as to which a certificate relating to eviction has been issued * * * may file * * * application for review * * *."

Petitioner now relates the manner in which the ruling of this Honorable Court and the regulations based thereon were evaded and circumvented by the landlord with the full knowledge and acquiescence of the housing authorities.

On the eve of that trial in the Baltimore City Court (Starting Oct. 23, 1947) petitioner learned that his counsel, over petitioner's objection, had summoned as witness (under pretense that he was to testify for petitioner), Mr. Walter R. Heath, now a respondent, and that Mr. Thomas E. Barrett, Jr., Chief Rental Attorney was to appear in his stead—(Request of the Clerk of the Court to summon him (Mr. Heath) is part of the record in said Court—Case No. 002298).

Upon this discovery, the petitioner caused the appearance of counsel responsible for this act to be struck out. The order for entry was filed in the case record Oct. 23, 1947.

Petitioner was denied opportunity to procure new counsel and was compelled to conduct the case himself. As the Baltimore City Court record will show, he challenged the jurisdiction of the court; was promised, but in the course of the trial, denied, opportunity to argue the point. That court record will show also that new counsel engaged during recess toward the end of the trial was not accorded ample opportunity to prepare or to fully acquaint himself with the proceedings. The following excerpt from the testimony will apprise this Honorable Court of the manner in which, (without issuing any order or certificate on which the tenant-petitioner might predicate a protest as contemplated in the Parker v. Fleming, 329 U. S. 531 decision, and the regulation deriving therefrom), petitioner was deprived of his rights under federal statutes. From the quoted testimony it will be seen that a court lacking jurisdiction had been given the go-ahead signal by the housing authorities. Their chief rental attorney was present during this procedure. It constituted constructive issuance of certificate.

Mr. Matthew Hensler, employee of Safe Deposit and Trust Co., testifying for landlords: Questioning by this petitioner:

* * * * * *

"Q. (By Mr. Berlinsky) Would those repairs, extend the electricity to the rear room paper rear room and the store to the second floor, affect in any way the business portion of that house?

(Mr. Butler) Objected to.

(The Court) Objection sustained. I might say this, Mr. Berlinsky, it might clarify things. In this court it has been customary to rely on the *O. P. A's certification* (all italics here supplied) as to whether the property was a dwelling property, *we accept certification* to that effect. If it is not a dwelling property, and is a business property, of course, we do not have any certification at all. So, if that is what you are attempting to bring out, *we accept the certification as conclusive*, and we do that under a number of Supreme Court cases which have held to that effect.

(Mr. Berlinsky) Haven't I the right to rely upon fundamental law?

(The Court) The law itself is well settled. If they say *'we have jurisdiction' we rely on their say-so.*"

* * * * * *

"(Mr. Berlinsky) May I say, the lease itself was an acknowledgement on the part of the landlord that it was for dwelling purposes.

(The Court) That does not necessarily control. *The O. P. A. certificate would control.*

The full significance of the statement of the Judge presiding at the hearing in the United States District Court, March 4, 1949, as quoted (page 15 hereof) is now revealed; it says in part: "* * * *he has renounced jurisdiction to the City authorities and the City authorities have assumed jurisdiction* * * *." (Italics supplied.)

On page 14 respondents ask this Honorable Court to believe statements evidently not made in good faith and which the record before the Court proves not to be correct.

Respondents say:

> "In the instant case, petitioner requested the Housing Expediter to bring suit to enjoin his eviction on the ground that the premises occupied by him were used predominantly as a dwelling rather than as a business establishment as claimed by his landlords."

Exhibit 2 of the Docket of Entries (R-8) is the illegal notice which the landlords sent petitioner. The Court will observe that it does not state a ground upon which the landlord sought removal. This failure to state a ground is mentioned in petitioner's plea for writ of certiorari beginning last two lines page 3: "* * * landlords, despite Sec. 209(a) instituted suit to evict,—People's Court, Baltimore (R-3 par. 5) *notice stated no grounds* (R-8 Ex. 2)."

Again, same page (14), immediately following, respondents say:

> "The conclusion of the Housing Expediter not to sue as requested by petitioner was clearly based on the exercise of sound discretion."

Since no such ground had been shown and no such request made, as the record proves, how could any alleged conclusion have been "based on the exercise of sound discretion" with regard to a non-existant ground and a non-existant request?

When the notice to move, within one month, was given by the landlord April 29, 1947 and it was then first discovered that the landlords had failed to register the property the housing authorities were appealed to,—*not to sue* but to have them register which registration, required of landlords, Sec. 7 would have automatically resolved the matter.

A CONSIDERATION OF THE MEMORANDUM OPINION OF JUDGE E. PAUL MASON

(Appendix B. Respondent's Brief, pp. 19-23.)

P. 20.

> "I find nothing in this case to indicate that the property, 857 North Howard Street is subject to the regulations of the O. P. A."

This is not for the state courts to decide. As property leased (in part) for dwelling it was controlled property and under jurisdiction of the Housing Expediter who might give certificate subject to right of protest through proper procedure in accordance with this Honorable Court's decision in Parker v. Fleming, 329 U. S. 531.

The lease (Appendix to petition for writ of certiorari) is for antique shop and dwelling. Certainly it means that a part of the structure was for use for dwelling purposes and it was so used since 1933. (R-5 par. 15).

Property rented or even offered for rent and only partly used for dwelling purposes is "controlled housing," i.e., housing accommodations as defined in Section 13 (a) (6) quoted in full p. 6, petition for writ of certiorari.

> "Apparently, there has been no effort by either the landlord or the tenant to regard it as anything else but a business property."

The lease speaks for itself. The lease was a contract based on the fact, agreed to by both parties, that the use was to be for "antique shop and dwelling", and it was so used by petitioner for fourteen years.

P. 20.

> "Neither party has apparently endeavored to have it classed as a dwelling unit, or to have any part classed

as a dwelling unit and, if they have, I assume unsuccessfully because I cannot believe that it was ever registered, not having the evidence before me; and I have the evidence of the plaintiff in the case that it was never registered because they regard it as business property."

The lease determines—it speaks for itself.

The responsibility for registering rests with landlord exclusively. (Sec. 7 of regulations).

As to use of property P. 21.

"The testimony of Mr. Foster, produced on behalf of Plaintiffs, which is not substantially denied. * * *"

The opinion is based on testimony of Mr. Foster who was the only witness besides petitioner to testify as to the use of the house which testimony the Court says, was not substantially denied. Mr. Foster testified that he had inspected the property only twice since 1940; that these inspections were in July 1947 which was after the suit was filed.

Evidence by the petitioner whose dwelling it had been for fourteen years was almost a complete denial.

As to other matters mentioned in the opinion,—lack of water, of gas, disrepair of bathing facilities—a witness from Baltimore City Water Department and one from the Gas Electric Company testified that the service was disrupted because service pipes and meter were in need of repair. It was the responsibility of landlords to keep such services in usable condition; testimony showed they had not done so; *had made no repairs for fourteen years and had reneged* on promise to make certain repairs at time the lease was entered into,—doing only part of the work that was promised.

If the opinion fairly reflected the testimony it would read that the landlords went all out to render uninhabitable a place they had rented (in part) as dwelling; for the maintenance of which, as such, they were responsible. Drawing on the records for dates it is seen that the tenant carried the property for the landlords through the depression years.

REASONS FOR GRANTING THIS PETITION

Petitioner respectfully prays this Honorable Court to consider as here appropriate the same reasons stated at page 15 of his petition for writ of certiorari,—with this addition, to wit:

That the low estate to which are consigned the laws of the United States by the authorities of a Federal Bureau, charged with their proper administration, as evidenced in the proceedings before the Baltimore City Court and the United States District Court for the District of Maryland (related in this petition) would indicate the need for corrective measures by the Supreme Court of the United States.

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APPENDIX TO PETITION FOR RE-HEARING ON PETITION FOR WRIT OF CERTIORARI NO. 697

The pertinent Federal provisions of the 1942 Act as amended and regulations applicable are as follows:

They are found in Federal Register Eleven at pages indicated:

Sec. 206-b (of the 1948 Amendment) pertinent to the civil action against respondents instituted Dec. 23, 1948, quoted in full pp. 4 and 5 petition for writ of certiorari.

P. 12063 Sec. 7 Registration (a) On or before the date specified in schedule A of this regulation, or within 30 days after the property is first rented, whichever date is later, every landlord of housing accommodations rented or offered for rent shall file in triplicate a written statement on the form provided therefor to be known as a registration statement. The statement shall identify each dwelling unit and specify the maximum rent provided by this regulation for such dwelling unit and shall contain such other information as the administrator shall require. * * *

P. 12061 Sec. 6 Removal of Tenant (a) Restrictions on removal of Tenant. So long as the tenant continues to pay the rent to which the landlord is entitled, no tenant shall be removed from any housing accommodations, by action to evict or to recover possession, by exclusion from possession, or otherwise, nor shall any person attempt such removal or exclusion from possession, notwithstanding that such tenant has no lease or that his lease or rental agreement has expired or otherwise terminated, and regardless of any contract, lease, agreement or obligation heretofore or hereafter entered into which provides for entry of judgment upon the tenant's confession for breach of the covenants thereof or which otherwise provides contrary hereto, unless

(1) Tenants' refusal to renew lease * * *

(2) Tenants' refusal of access to landlord * * *

(3) Violating obligation of tenancy or committing nuisance * * *

(4) Sub-tenants on expiration of tenant's lease * * *

(5) Revoked

(6) Occupancy by landlord * * *.

P. 12061 §3 Violating Obligation of Tenancy or Committing Nuisance. The tenant (i) has violated a substantial obligation of his tenancy, other than an obligation to pay rent, and has continued, or failed to cure such violation after written notice by the landlord that the violation cease, or (ii) is committing or permitting a nuisance or is using or permitting a use of the housing accommodations for an immoral or illegal purpose; or (4) * * * (has to do with sub-tenants on expiration of tenant's lease with no application to instant case).

P. 12062 (d) Notices Required (1) Notices prior to action to remove tenant. Every notice to a tenant to vacate or surrender possession of housing accommodations shall state the ground under this section upon which the landlord relies for removal or eviction of the tenant. A written copy of such notice shall be given to the area rent office within 24 hours after the notice is given to the tenant.

No tenant shall be removed or evicted from housing accommodations by court process or otherwise unless at least ten days (or where * * * the ground for removal or eviction is non-payment of rent, the period required by the local law for notice prior to the commencement of an action for removal or eviction in such cases but in no event less than three days) prior to the time specified for surrender of possession and to the commencement of any action for removal or eviction, the landlord has given written notices of the proposed removal or eviction to the tenant and to the area rent office, stating the ground under this section upon which such removal or eviction is sought and specifying the time when the tenant is required to sur-

render possession: Provided, however, that the requirement of this sentence shall not apply to housing accommodations within the City of Baltimore, Maryland, the northeastern New Jersey Defense-Rental Area, *when the ground for the removal or eviction of a tenant is non-payment of rent.* * * * (More concerning cases of non-payment of rent not applicable to instant case).

P. 12063 §2. Notices at time of commencing action to remove tenant. At the time of commencing any action to remove or evict a tenant, including an action based upon non-payment of rent, the landlord shall give written notice thereof to the area rent office stating the title of the case, the number of the case where that is possible, the court in which it is filed, the name and address of the tenant, and the ground under this section on which removal or eviction is sought.

P. 12064 §8 Evasion (a) General. The maximum rent and other requirements provided in this regulation shall not be evaded, either directly or indirectly, in connection with the renting or leasing or the transfer of a lease of housing accommodations, by way of absolute or conditional sale, sale with purchase money or other form of mortgage, or sale with option to repurchase or by modification of the practices relating to payment of commission or other charges or by modification of the services furnished with housing accommodations, or by trying agreement or *otherwise.* (Italics supplied.)

Concerning provisions governing issuance of certificate relating to eviction, see page 16, supra.

"Housing accommodations are defined in Section 13 (a) (6) of the Housing Regulation as *"any building, structure, or part thereof, or land appurtenant thereto or any other real or personal property rented or offered for rent for living or dwelling purposes, together with all privileges, services, furnishings, furniture, equipment, facilities and improvements connected with the use or occupancy of such property."*

Sec. 209 (a) "NO ACTION OR PROCEEDINGS TO RECOVER POSSESSION OF ANY CONTROLLED HOUSING ACCOMMODATIONS WITH RESPECT TO WHICH A MAXIMUM RENT IS IN EFFECT UNDER THIS TITLE SHALL BE MAINTAINABLE BY ANY LANDLORD AGAINST ANY TENANT IN ANY COURT, NOTWITHSTANDING THE FACT THAT THE TENANT HAS NO LEASE OR THAT HIS LEASE HAS EXPIRED, SO LONG AS THE TENANT CONTINUES TO PAY THE RENT TO WHICH THE LANDLORD IS ENTITLED unless" (Then follow several exceptions none of which apply to the case in question and none of which were alleged) (R. 8 Ex. 2).